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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

COUNTY OF VENTURA,

Plaintiff and Respondent,

v.

VENTURA COUNTY PROFESSIONAL PEACE OFFICERS ASSOCIATION,

Defendant and Appellant;

TERRY KITAGUCHI,

Real Party in Interest and Appellant.

2d Civil No. B204907
(Super. Ct. No. 56-2007-00288917)
(Ventura County)

Ventura County Professional Peace Officers Association (VCPPOA) obtained an arbitration award that required the County of Ventura (County) to reinstate Real Party in Interest Terry Kitaguchi as an airport operations officer. Kitaguchi appeals from an order vacating the award as contrary to public policy, and awarding costs to County. Kitaguchi contends (1) that the County waived the public policy grounds upon which the award was vacated, because it did not plead nor prove public policy grounds in the arbitration, (2) that the award was not contrary to a well-defined public policy, (3) that the County was not entitled to costs because it did not request them, and (4) that Kitaguchi should be awarded

attorney fees and costs on appeal. We reverse but deny Kitguchi's request for fees and costs.

FACTUAL AND PROCEDURAL BACKGROUND

The County hired Kitaguchi in 2004 as an airport operations officer with security duties. He was a registered sex offender with a prior felony conviction for having sexual relations 18 years earlier with a 14-year-old girl. On his application for the airport position, he disclosed the fact that he had a felony conviction by stating, "'1986 in Phoenix, Arizona,' . . . '100 days and four years probation.'" He did not disclose the nature of the offense or the fact that he was a registered sex offender. The County concedes that Kitaguchi "inexplicably was apparently not asked by the County about the nature of his crime . . . ."

In 2006, employees of an airport tenant, Signature Airlines, complained that Kitaguchi made sexually inappropriate comments to them and used profanity while he was on the job. The County conducted an investigation, and concluded that the conduct did occur. The County terminated Kitaguchi on the grounds of inexcusable neglect of duty, failure of good behavior, discourteous treatment of the public, acts incompatible with the public service and acts inimical to the public service. Each of these grounds were cause for demotion, suspension, reduction in pay or dismissal under the terms of a Memorandum of Agreement (MOA) between County and Kitaguchi's union, VCPPOA. Kitaguchi had no prior disciplinary record.

VCPPOA appealed the termination through binding arbitration, pursuant to the terms of the MOA. The MOA provided that the arbitration would be final and binding, and that "[i]f the Arbitrator finds that some or all of the charges are true, then he shall make a decision confirming or modifying the action . . . limited to those disciplinary actions described in Section 3102 [demotion, suspension, reduction in pay and dismissal.]" The MOA also provided that "nothing shall preclude the Arbitrator from ordering the reinstatement of an employee with or without backpay." The parties agreed that the issues before the

arbitrator were: "Whether the factual charges are true. If so, whether the discipline was appropriate."

At the arbitration, several employees of Signature testified. Gaile Vill, who was 24 years old, reported that just after she was hired by Signature in June of 2005, Kitaguchi asked her if she was having sex with her boyfriend. She testified that she "let it go." She testified that when Signature later employed two young female customer service representatives, Kitaguchi began to spend up to 45 minutes at a time in the Signature lobby. The new employees were Jacquelyn Nelson and Theresa Moraga.

Jacquelyn Nelson, age 21, testified that when Kitaguchi learned she was from Phoenix, Arizona, he told her that "girls were easy" there. This offended her. She also testified that one night when she was trying to leave work, Kitaguchi used his security truck to block her car. He moved out of her path, but the incident scared her.

Theresa Moraga, age 19, reported that Kitaguchi frequently spent an hour in the Signature lounge area talking to employees, customers and pilots and eating cookies that were intended for customers and pilots. Once, Kitaguchi said to Moraga that Mexican girls her age always have sex and babies. Moraga responded that most freshmen do start having sex too early. He asked whether she was one of those freshmen, and she said she was not. He asked whether she was "one of those sophomores, juniors," and she said no. He laughed and said: "[Y]ou know I [am] going to keep going . . . 'dang, you were one of those eighth graders.'" She told him it was none of his business and he laughed.

Moraga also reported that, on another occasion, Kitaguchi asked her whether she was still a virgin. He asked if she and her boyfriend had sex and when she did not respond he said: "Seven months and you guys haven't done anything." He asked again if she was a virgin and when she did not respond he insisted. She said she was not going to answer and he laughed.

Kitaguchi admitted that some of these conversations occurred and he did not deny the others. He did not recall blocking any employee's car. He testified that the conversations were intended to establish relationships with the employees so that they would be cooperative when he needed information for his employer about activities around the airport. He agreed "now" that it was inappropriate to discuss Moraga's sex life with her. He said that at the time he did not think it was inappropriate.

The arbitrator ordered the County to reinstate Kitaguchi as an airport operations officer, subject to an unpaid disciplinary suspension from the date of termination to the date of reinstatement. The arbitrator reasoned that "[t]he conversations which occurred between [Kitaguchi] and Ms. Nelson and Ms. Moraga occurred. However, their context was not sufficient to justify discharge. The factual charges with regard to the physical blocking of Ms. Nelson's vehicle are found not to be sustainable. [¶] The level of discipline was not appropriate." The arbitrator found that "the conversations may well have involved attempts to engage the ladies in more than merely conversation, but nothing ever came of that. This certainly seems to be atypical behavior that can be nipped in the bud by discussion, counseling, and preventive punishment." The arbitrator noted that, "Mr. Kitaguchi has a strong background in aeronautics and administration. He is most likely worthy of a 'last chance' to give him an opportunity to rehabilitate himself and be rehabilitated," and that Kitaguchi had operated "with virtually total freedom in carrying out his security duties." The arbitrator recommended that, "in a time of heightened security as we are in now, the Department [of Airports] might be well-placed to structure his assignments better, allowing for a little bit closer scrutiny."

The arbitrator found that "[t]he Department was itself unreasonable, acting arbitrarily and somewhat capriciously in summarily discharging [Kitaguchi.]" He expressed concern that the discovery of Kitaguchi's status as a sex offender "at around the same time [employees] were writing their recollections of

conversations" may have had a "halo effect." The arbitrator stated: "It is clear that Mr. Kitaguchi was hired with full knowledge by the County of his conviction. The County's official position is that it was not influenced now by his criminal record in making the decision to terminate him. Hopefully, that is the case since it should not bear on the facts as laid out now."

The County filed a petition to vacate the award on the ground that it violated public policy. The trial court granted the petition to vacate the award, finding that the arbitrator exceeded his authority by directing the County to reinstate Kitaguchi, because Kitaguchi's reinstatement would violate a current well-defined public policy against sexual harassment in the workplace. The trial court awarded costs to the County as the prevailing party.

DISCUSSION

We apply de novo review to a trial court's decision to vacate or confirm an arbitrator's award. (*Jordan v. Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443.) Judicial review of an arbitrator's award is very limited, because of the strong public policy in favor of private arbitration. (*Bd. of Education v. Round Valley Teachers Assoc.* (1996) 13 Cal.4th 269, 275.) It is the general rule that an arbitrator's decision is not subject to judicial review for errors of fact or law. (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1361.) This rule ensures that the parties receive the benefit of their arbitration agreement: speedy resolution by a tribunal of their choosing. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9-10.)

Waiver

We first reject appellant's contention that County waived its public policy argument by failing to claim in the arbitration that reinstatement would violate public policy. In *Moncharsh v. Heily & Blase, supra,* 3 Cal.4th, page 30, the court held that failure to raise a claim in the arbitration that an underlying employment contract is illegal, or that the arbitration agreement is illegal, waives the claim for any future judicial review. Here, County does not claim illegality of

an agreement. The County claims that the reinstatement award violated a clear expression of public policy that requires employers to take corrective actions in response to sexual harassment in the workplace. A contention that an arbitration award violates a clear expression of public policy is not waived by failure to assert that claim in the arbitration. (*Jordan v. Dept. of Motor Vehicles*, *supra*, 100 Cal.App.4th at p. 453 [$89 million attorney fees arbitration award against state violated "gift" provisions of Cal. Const. and Rev. & Tax. Code because state's maximum fee exposure was determined to be $18 million by a final court decision].)

Arbitration Award in Violation of Public Policy

Arbitration awards may be vacated or corrected only on very limited statutory grounds. Pursuant to Code of Civil Procedure section 1286.2, subdivision (a)(4), an award may be vacated or corrected where "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." One way that an arbitrator may exceed his or her powers is by issuing an award that violates a well-defined public policy. (*Eastern Associated Coal Corp. v. United Mine Workers of America* (2000) 531 U.S. 57, 63; *Jordan v. Dept. of Motor Vehicles*, *supra*, 100 Cal.App.4th 431, modified on denial of rehearing, review denied.) "Without an explicit legislative expression of public policy, however, courts should be reluctant to invalidate an arbitrator's award on this ground." (*Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at p. 32 [rejecting the argument that an arbitration award dividing fees between an attorney and his former law firm violated the public policy against fee splitting expressed in the California Rules of Professional Responsibility].)

An award violates public policy only if it "run[s] contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interest." (*Eastern Associated Coal Corp. v. United Mine Workers of America*, *supra*, 531 U.S. at p. 63, citing *United Paperworks Intern. Union, AFL-CIO v. Misco, Inc.*

(1987) 484 U.S. 29, 43.) There is disagreement between federal appellate courts whether a court may vacate an arbitration award on public policy grounds only if the award directly violates a statute, regulation or other manifestation of positive law. (*Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, Intern. Assoc. of Machinists and Aerospace Workers* (9th Cir. 1989) 886 F.2d 1200, 1216-1217 [violation of positive law required]; *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A.* (5th Cir. 1993) 991 F.2d 244, 253-254 [violation of positive law not required]; *Seymour v. Blue Cross/Blue Shield* (10th Cir. 1993) 988 F.2d 1020, 1025 [violation of a clearly expressed law required]; *International Broth. of Elec. Workers, Local 97 v. Niagra Mohawk Power Corp.* (2d Cir. 1998) 143 F.3d 704, 722 [assuming violation of positive law not required].) California's courts have not addressed the issue. The United States Supreme Court has stated, in dicta: "We agree, in principle, that courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law. Nevertheless, the public policy exception is narrow and must satisfy the principles set forth in *W.R. Grace* [461 U.S. 757] and *Misco* [484 U.S. 29]." (*Eastern Associated Coal Corp. v. United Mine Workers of America*, *supra*, 531 U.S. at p. 63.) We have found no California authority for vacating an award on public policy grounds absent a violation of positive law, but we need not decide the question to resolve the present case. Using either approach, the arbitration award here must be confirmed.

We first note that an award will rarely be vacated on public policy grounds. In *Eastern Associated Coal Corporation*, a truck driver who was subject to random drug testing under department of transportation regulations tested positive for marijuana. Eastern sought to discharge him, and an arbitrator reinstated him subject to an unpaid suspension and other conditions. One year later, the driver tested positive for marijuana again. Eastern again sought to terminate him, and the arbitrator reinstated him subject to an unpaid suspension and more severe conditions. A trial court confirmed the award, rejecting Eastern's argument that

public policy precluded reinstatement. The Circuit Court and the United States Supreme Court affirmed. Although a well-defined public policy against use of illegal drugs by persons involved in safety sensitive jobs, such as driving trucks, is expressed in the Omnibus Transportation Employee Testing Act of 1991, that policy did not mandate termination. (*Eastern Associated Coal Corp. v. United Mine Workers of America*, *supra*, 531 U.S. at p. 65.) "Neither the Act nor the regulations forbid an employer to reinstate in a safety-sensitive position an employee who fails a random drug test once or twice. (*Ibid.*) Because the comprehensive regulations allowed for progressive discipline and rehabilitation, they did not preclude enforcement of the award.

Likewise, Title VII of the Civil Rights Act of 1964 and the Fair Employment and Housing Act (FEHA) express a well-defined public policy requiring employers to take corrective action in response to sexual harassment in the workplace (42 U.S.C. § 2000e; 29 C.F.R. § 1604.11(d); Gov. Code, §§ 12920, 12921 & 12940, subds. (j) & (k)), but they do not mandate termination in every case of sexual harassment. Title VII requires the employer take "immediate and appropriate corrective action" (29 C.F.R. § 1604.11(d)) and the FEHA requires the employer take all reasonable steps necessary to prevent harassment from occurring (Gov. Code, § 12940, subds. (j) & (k)). Because Title VII and the FEHA allow for progressive discipline and rehabilitation, they do not preclude enforcement of the reinstatement award.

The arbitrator's award did not ignore or condone Kitaguchi's conduct. He determined that the appropriate and reasonable corrective action was to impose a five-month suspension without pay. This was Kitaguchi's first disciplinary incident. Suspension and reinstatement of Kitaguchi neither directly violated the provisions of Title VII and the FEHA nor violated the public policy that they express.

In *City of Palo Alto v. Service Employees International Union, Local 715* (1999) 77 Cal.App.4th 327, the city terminated a utilities employee after he threatened to shoot a coworker and the coworker's family. An arbitrator ordered

reinstatement, finding that the statements were taken out of context and that the city had not evenhandedly applied its workplace-violence policy. (*Id.* at pp. 332-333.) The appellate court concluded that the award did not violate the "explicit public policy requiring employers to take reasonable steps to provide a safe and secure workplace" that is expressed in California's Labor Code, Code of Civil Procedure and the Code of Regulations. (*Id.* at pp. 336-337.) Reinstatement was "not necessarily precluded because there is no absolute public policy against employment of persons who make threats of violence, which operates regardless of whether there is an actual risk of violence." (*Id.* at p. 337.) However, the award did directly violate a court-ordered injunction requiring the employee to stay away from his former coworker because the award required reinstatement to the same position and work crew. (*Id.* at pp. 339-340.) On that ground alone, the Court of Appeal vacated the order confirming the award and remanded the case to the trial court for further proceedings. (*Id.* at p. 340.)

Here, no injunction precludes Kitaguchi's return to the workplace. The County concedes that there is no absolute public policy against reinstatement of persons who have engaged in sexual harassment. The reinstatement determination was based on the arbitrator's factual findings concerning the context of Kitaguchi's statements, the lack of adequate supervision, and the "arbitrary" manner in which he felt the County applied its disciplinary policies. We are not free to reject factual findings of an arbitrator, even if we disagree with them. (*United Paperworks Intern. Union, AFL-CIO v. Misco, Inc.*, *supra*, 484 U.S. at p. 38.)

The County makes a compelling argument that reinstatement was not the correct outcome, in view of Kitaguchi's criminal history. Nevertheless, an arbitrator does not exceed his or her powers by making a factual or legal error and an arbitrator has broad discretion to fashion an equitable remedy. (*Moncharsch v. Heily & Blase*, *supra*, 3 Cal.4th at p. 12.) For example, in *Hacienda Hotel v. Culinary Workers Union Local 814* (1985) 175 Cal.App.3d 1127, abrogated on other grounds in *Advanced Micro Devices, Inc. v. Intel Corp*. (1994) 9 Cal.4th 362,

the arbitrator did not exceed his powers by determining that the employer did not have good cause for discharging an employee for manipulating his time cards, even if the arbitrator improperly based that determination on the fact that the employee's supervisor was not discharged for her role in the manipulation. Similarly, in *Taylor v. Crane* (1979) 24 Cal.3d 442, the appellate court reversed a trial court order vacating an arbitration award that required the City of Berkley to reinstate a police inspector, subject to suspension, although he had violated police firearms regulations by shooting at three people, and wounding one, who posed no threat to life but who seemed to be burglarizing a car that belonged to the inspector's friend. (*Id.* at pp. 445-446.) Here, too, we are bound to enforce the award. "When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like judges, are fallible." (*That Way Productions Co. v. Directors Guild of America* (1979) 96 Cal.App.3d 960, 965.)

Attorneys' Fees

Although Kitaguchi prevails on this appeal, he does not meet the requirements for an award of attorneys' fees under section 1021.5 of the Code of Civil Procedure or section 800 of the Government Code. The confirmation of the arbitration award does not confer a significant benefit on the general public or a large class of persons. (Code Civ. Proc., § 1021.5.) The primary effect of Kitaguchi's success on appeal is to advance his personal interests. (*Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 635.) Section 800 of the Government Code allows a litigant who successfully challenges the determination of an administrative agency to recover attorneys' fees if the litigant demonstrates that the public agencies decision was arbitrary or capricious, but we have found no case applying Government Code section 800 to award fees to a party who obtains confirmation or vacation of an arbitration award against a public agency. Even if Government Code section 800 were to apply to these proceedings, the question of whether the County's conduct was wholly arbitrary and capricious would be a question of fact for the court (*Zuehlsdorf v. Simi Valley Unified School Dist.* (2007)

148 Cal.App.4th 249), which would not be bound by the arbitrator's findings that the County's actions were arbitrary and "somewhat" capricious. We do not find that the County's actions were arbitrary or capricious, and the trial court made no such findings below.

Costs

Appellant's challenge to the trial court's award of costs to County as prevailing party pursuant to Code of Civil Procedure section 1293.2 is moot, because the arbitration award must be confirmed and the judgment reversed.

The judgment vacating the arbitration award and awarding costs to the County is reversed. The trial court is directed to vacate its order and to enter another order affirming the arbitration award and directing the County to reinstate Kitaguchi with back pay from the date of the arbitrator's award. Each side shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Ken W. Riley, Judge

Superior Court County of Ventura

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